

RECENT FEDERAL CASES ON AGE DISCRIMINATION

***Smith v. City of Jackson*, 125 S. Ct. 1536 (2005).**

Police officers and dispatchers employed by the city of Jackson, Mississippi, contended that salary increases received in 1999 violated the Age Discrimination in Employment Act of 1967 (ADEA) because they were less generous to officers over the age of 40 than to younger officers. The trial court granted summary judgment for the city, which the Fifth Circuit affirmed, holding that the disparate-impact theory of liability was categorically unavailable under the ADEA. The Supreme Court found that this conclusion was in error, holding that the “disparate-impact” theory of recovery, announced in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) for cases brought under Title VII of the Civil Rights Act of 1964, is cognizable under the ADEA. A plurality opined that this was Congress’ intent in enacting the ADEA, while Scalia’s concurrence grounds this conclusion in the EEOC’s interpretation of the law, and nothing more.

There is a crucial difference between Title VII and the ADEA: 29 U.S.C. § 623(f)(1) contains language that significantly narrows the ADEA’s coverage by permitting any “otherwise prohibited” employment action “where the differentiation is based on reasonable factors other than age.” Thus, the test for disparate impact under the ADEA is different than the test for disparate impact under Title VII. “Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.”

Despite this correction, the Supreme Court affirmed the judgment of the lower courts, because the City’s decision to grant a larger raise to lower echelon employees for the purpose of bringing salaries in line with that of surrounding police forces was a decision based on a reasonable factor other than age.

***Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581 (2004).**

A collective-bargaining agreement between petitioner General Dynamics and the United Auto Workers eliminated the company's obligation to provide health benefits to subsequently retiring employees, except as to then-current workers at least 50 years old. Respondents were then at least 40 and thus protected by the ADEA, but under 50 and so without promise of the benefits. The District Court called the federal claim one of “reverse age discrimination,” and dismissed the case. A divided panel of the Sixth Circuit reversed, reasoning that the prohibition of § 623(a)(1), covering discrimination against “any individual . . . because of such individual's age,” should be read literally.

The Supreme Court sided with the trial court, finding that the legislative history of the ADEA indicates beyond a reasonable doubt that the ADEA was enacted “to protect a relatively old worker from discrimination that works to the advantage of the relatively young.”

***Machinick v. PB Power, Inc.*, 398 F.3d 345 (5th Cir. 2005).**

Plaintiff appealed the trial court’s summary judgment against his age discrimination claim. The plaintiff easily met the first three prongs of a prima facie discrimination case by producing uncontroverted evidence that he was qualified for his job, was terminated, and was a member of the protected class at the time of his termination. But the trial court found that his claim failed on the fourth prong because he could not show that he was replaced by a younger worker since defendant did not hire or reassign an individual to assume his position.

The Fifth Circuit rejected this, using the “modified *McDonnell-Douglas*” test that it promulgated in *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, *infra*. This test allows the plaintiff to establish the fourth prong of his prima facie case with evidence that he was “otherwise discharged because of his age.” The plaintiff’s supervisor who had made the decision to terminate the plaintiff had sent out e-mails saying he wanted to “strategically hire some younger engineers and designers.” Other evidence showed that PB Power wanted to have employees whose “mindsets reside in the 21st Century.” The same supervisor also made “age stereotyping remarks,” describing the plaintiff as “inflexible,” “not adaptable,” and possessing a “business-as-usual attitude.” The supervisor also asked the plaintiff about when he was planning to retire. These facts give rise to an inference that plaintiff was terminated because of his age, as does the retention of a younger person combined with the termination of the plaintiff. Because a reasonable jury could find that the plaintiff’s age was a motivating factor in PB Power’s decision to terminate him, and because PB Power did not produce evidence showing that it would have terminated the plaintiff even absent considerations regarding his age, summary judgment was not appropriate.

***Rachid v. Jack in the Box, Inc.*, 376 F.3d 305 (5th Cir. 2004).**

The plaintiff-appellant here charges that his age was a factor that motivated the defendant-appellee to fire him, while admitting that he had changed the time-cards of his employees in violation of instructions from his supervisor, the discovery of which precipitated his termination. The district court’s granted summary judgment against the plaintiff, stating that he had not established a prima facie case, and noting that “nothing in the record suggests that [Jack-in-the-Box]’s basis for terminating Rachid was a pretext.”

The Fifth Circuit reversed, finding that direct evidence of discrimination is not necessary for a mixed-motives analysis for an ADEA claim. The court promulgated a “modified *McDonnell Douglas* approach,” wherein the plaintiff must demonstrate a prima facie case of discrimination; the defendant then must articulate a non-discriminatory reason for its decision to terminate the plaintiff; and then the plaintiff must offer sufficient evidence to create a genuine issue of material fact suggesting either that the defendant’s reason is not true, but is instead a pretext for discrimination; *or* that the defendant’s reason, while true, is only one of the reasons for its conduct, and another motivating factor is the plaintiff’s protected characteristic.

In this case, the plaintiff had complained to the defendant’s human resources department that he had been the victim of harassment because of his age, and the record showed that the supervisor had made ageist comments such as “he’s probably in bed or he’s sleeping by [now] because of his age” Furthermore, the plaintiff raised genuine doubt about whether he had in fact violated company policy. With these issues of material fact in dispute, summary judgment was improper.

***Bergen v. Cont’l Cas. Co.*, 368 F. Supp. 2d 567 (N.D. Tex., Apr. 7, 2005) (mem. op.).**

This is another case using the modified *McDonnell Douglas* approach. Here, the plaintiff’s prime facie case was unchallenged, as was the defendant’s proffered legitimate reason for terminating the plaintiff, who sued for age discrimination, sex discrimination, disability discrimination, and retaliatory discharge. To support her allegation that these reasons are merely pretext, the plaintiff, along with generally averring that the defendant’s reasons for firing her were discriminatory, offered two statements made by her supervisors: One said “that he did not see long-term employees going very far, that they are stale and inbred,” and the other said that “the [Company] wanted new blood and will be looking at hiring new trainees from college.”

This was insufficient to show that the defendant’s reason was a pretext, because the plaintiff’s evidence did not raise a genuine issue of material fact as to whether Defendant’s articulated reason was false.

These statements were insufficient for a “mixed-motives” standard as well, because there was no indication that the statement was made toward, about, or in the context of the decision to terminate the plaintiff, or that supervisors who made these statements participated or influenced that decision.

***Good v. Ask Jeeves, Inc.*, 2004 U.S. Dist. LEXIS 27207 (N.D. Tex. 2004).**

The plaintiff in this case survived a motion for summary judgment by presenting sufficient evidence to create a genuine issue of material fact regarding the defendant’s actual reason for discharging the plaintiff, who had alleged age and sex discrimination. The defendant contended that the plaintiff had been selected for termination during a reduction in force because of her low ranking among the sales staff. But the record suggested that the stated objective criteria for the ranking was not followed, since the plaintiff’s sales performance exceeded both a younger male and a younger female, neither of whom were terminated. Further, anticipated sales revenue was also considered in determining ranking, which was a subjective forecast not indicative of an actual sale. This raised a genuine issue of material fact about whether the defendant’s legitimate reason was false, the ultimate resolution of which depended on witness credibility. Thus, the defendant’s motion for summary judgment was denied.

The court here also follows the modified *McDonnell-Douglas* approach from *Rachid*, stating that if the plaintiff establishes that age or gender was a motivating factor in the employment decision, the defendant must prove that the same adverse employment action would have been taken by it, regardless of discriminatory animus. This is different from the traditional approach, under which the plaintiff has to prove that the reason proffered by the defendant is false. But the court also notes that this difference here is not very significant, since under both approaches the plaintiff bears the burden of proving, by a preponderance of the evidence, that the defendant discriminated against her because of her protected status.

RECENT FEDERAL CASES ON DISABILITY DISCRIMINATION

***Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003).**

In 1991, the appellee-plaintiff was fired by the appellant-defendant for failing a drug test. Two years later, having gone through rehabilitation, he reapplied for his job. Raytheon contended that it had a neutral policy against rehiring employees previously terminated for violating workplace conduct rules and that this neutral company policy constituted a legitimate reason for its decision not to rehire respondent. The Ninth Court of Appeals, although admitting that petitioner's no-rehire rule was lawful on its face, held the policy to be unlawful as applied to former drug addicts whose only work-related offense was testing positive because of their addiction.

The Supreme Court disagreed with the Ninth Circuit's logic and its conclusion: "If petitioner did indeed apply a neutral, generally applicable no-rehire policy in rejecting respondent's application, petitioner's decision not to rehire respondent can, in no way, be said to have been motivated by respondent's disability." The Court reproached the Ninth Circuit for considering not only discriminatory intent but also discriminatory impact of the policy. "Once respondent had made a prima facie showing of discrimination, the next question for the Court of Appeals was whether petitioner offered a legitimate, nondiscriminatory reason for its actions so as to demonstrate that its actions were not motivated by respondent's disability." The Court classified the no-rehire policy as a "quintessential legitimate, nondiscriminatory reason" for refusing to rehire an employee.

It is interesting to note that Court held that plaintiff did not preserve his *disparate impact* claim and thus did determine its validity.

***Tullos v. City of Nassau Bay*, 2005 U.S. App. LEXIS 11290 (5th Cir., June 10, 2005) (per curiam) (not designated for publication).**

The City of Nassau Bay appealed the judgment based upon a jury verdict finding that police officer Tullos was a qualified individual under the Americans With Disabilities Act who was terminated from his position because he was *regarded as* disabled. The officer was fired after he was diagnosed with Post-Traumatic Stress Disorder, which the jury found to be in violation of the ADA. The Fifth Circuit affirmed.

The City argued that because Tullos's doctor told the City that he was not qualified, and Tullos never expressed any disagreement with his doctor's opinion, the City cannot be found liable under the ADA. The court agreed that a requirement that the employee at a minimum express to his employer disagreement with a doctor's opinion, if the opinion is to be discounted in determining whether the employee is qualified for the job, would be consistent with the ADA's emphasis on employer-employee interaction.

But the City failed to properly present this issue to the trial court by not objecting to jury instructions that (a) did not mention the possibility that Tullos could be unqualified even if he did have the requisite skills and education and could perform the essential functions of the job, and (b) failed to discuss any requirement that Tullos have disputed his doctor's diagnosis. The City also failed to raise in its motions for judgment as a matter of law any argument that Tullos should be found unqualified even if he could perform the essential functions of the job because of his failure to dispute the unfavorable diagnosis.

The City also argued that Tullos' application for disability benefits estopped him from claiming that he was qualified to work. But eligibility for Social Security and disability under the ADA are different standards, and the City failed to produce evidence about the particular assertions Tullos made to receive those benefits.

***McDowell v. Home Depot USA, Inc.*, 126 Fed. Appx. 168 (5th Cir., Mar. 11, 2005) (per curiam) (not designated for publication).**

After hip replacement surgery and an extended medical leave, Lola McDowell returned to work for her employer, The Home Depot. Soon after, McDowell began experiencing what she regarded as “harassment” by her new supervisor. She sued under the ADA alleging unlawful discrimination, failure to reasonably accommodate, and retaliation. The trial court granted summary judgment on all three claims. The Fifth Circuit affirmed.

The discrimination and accommodation claims were easily dismissed by the trial court because no reasonable jury could have concluded that the plaintiff was disabled under the ADA. The plaintiff’s conclusory sentence that her impairment substantially limits one or more major life activities was insufficient to preserve this issue for appeal, the court ruled..

As for the retaliation claim, the district court held that McDowell’s complaint to Home Depot’s Workplace Alert hotline was protected under the ADA and that her subsequent demotion was an “adverse employment action.” But McDowell failed to proffer any evidence of a causal link between the protected activities and her subsequent demotion, so the court dismissed the claim. On appeal, the plaintiff argued that the close proximity of her call to Workplace Alert on August 17 and her demotion on August 18 is sufficient evidence of causation to survive summary judgment. The Fifth Circuit, however, has rejected temporal proximity, standing alone, as a basis for showing causation in retaliation cases, and followed that precedent here.

***Winters v. Pasadena Indep. Sch. Dist.*, 124 Fed. Appx. 822 (5th Cir. 2005) (per curiam).**

Stormy Jean Winters asserted that the Pasadena Independent School District violated the ADA by not renewing her teacher contract for the 1997-98 school year because she had a record of and was regarded as having the disability of depression. The District denied that it regarded the plaintiff as disabled, and asserted that it had offered a legitimate reason for not rehiring Winters, which she had failed to rebut.

The plaintiff argued that the fact that she went on medical leave for depression and was hospitalized in a mental institution during this time was evidence that she has a record of disability, but the Fifth Circuit stated, “Simply being hospitalized does not establish a record of a mental disability.” In addition to this deficiency, the plaintiff failed to present evidence that school officials regarded her depression as being a condition that prevented her from performing the major life function of work. Thus, summary judgment in favor of the defendant was affirmed.

***Windly v. Hightower Oil Co.*, 91 Fed. Appx. 330 (5th Cir. 2004) (per curiam) (not designated for publication).**

Nancy Windly was manager of a Hightower Oil convenience store in Coldwater, Mississippi. She was fired by the store’s owner, who mistakenly thought that she had a bleeding ulcer, caused by the stress of her job. He felt it would be in his and Windly’s best interests to terminate her. Windly told him she did not have a bleeding ulcer, but he did not change his mind. A memo written by the store owner stated that she “will be laid off due to stress related to the job in managing personnel.”

Hightower Oil moved for summary judgment, contending that Windly had no evidence that she was terminated for being regarded as disabled. The magistrate judge granted the motion and dismissed the case.

On appeal, Windly argued that she should be regarded as disabled under the ADA if her employer considered her incapable of filling supervisory positions because of the level of stress that they involve. But the court found that the record reasonably supports at most an inference that Windly was regarded as unable to perform a relatively narrow range of particularly demanding managerial jobs. That kind of perceived limitation does not rise to the level of a “substantially limiting” (i.e., disabling) condition under the ADA, so the dismissal was affirmed.

***Arrington v. Southwestern Bell Tel. Co.*, 93 Fed. Appx. 593 (5th Cir. 2004) (per curiam) (not designated for publication), cert. denied 2004 U.S. LEXIS 5598 (U.S., Oct. 4, 2004).**

Dick Arrington was diagnosed with diabetes in 1986, which the company was aware of because he took disability leave in 1995. When a dispute over the date for his return to work arose, SWB discharged him but later rehired him after he filed a complaint with the EEOC. SWB repeatedly counseled Arrington for absenteeism and productivity problems beginning in 1987. In November 1997, he was placed on probation for one year, during which he was subject to dismissal for unsatisfactory performance of his job duties. Then, on June 24, 1998, Arrington’s supervisor visited a job site listed on Arrington’s schedule, but he could not find Arrington, and a customer complained of Arrington’s rude behavior and inability to finish the job, which was similar to other complaints SWB had received about Arrington. SWB offered him a Supplies Attendant position, which did not involve either customer contact or productivity requirements, but Arrington refused this and SWB dismissed him. He sued for discrimination and retaliation under ADA, and the trial court granted summary judgment for the defendant.

The Fifth Circuit affirmed. It noted that while insulin-dependent diabetes can qualify as a disability, Arrington had not explained how *his* diabetes has limited any of his major life activities. He did allege that diabetes affected his production, but evidence of disqualification from a single position or a narrow range of jobs will not support a finding that an individual is substantially limited from the major life activity of working.

Plaintiff’s retaliation claim was dismissed as well because he failed to show that SWB’s non-discriminatory reason for firing him was pretextual. He did not identify any similarly situated employees (*i.e.*, those with a history of numerous customer complaints and a similarly low productivity level) who were either disciplined or discharged for their poor job performance: Disagreeing with an employer’s negative performance assessment is insufficient to show pretext.

***Vitale v. Ga. Gulf Corp.*, 82 Fed. Appx. 873 (5th Cir. 2003) (not designated for publication).**

While working as a pipefitter’s assistant, Peter Vitale injured his back, severely limiting the physical activities he could perform. The Fifth Circuit upheld the trial court’s judgment as a matter of law against Vitale because he failed to produce evidence showing that he was a qualified person with a disability at the time of the alleged discrimination. Since there was no doubt that the plaintiff was no longer qualified for his former position, the question then turned to whether the defendant could have provided a reasonable accommodation. He could have been given another, less demanding job, but he produced no evidence that Georgia Gulf needed to fill a vacant position that would have accommodated his restrictions. After noting that under the ADA an employer is not required to give what it does not have, the Fifth Circuit affirmed the judgment against Vitale but declined to award attorney’s fees to the defendant because Georgia Gulf’s assignments of other injured employees to light duty positions rendered this suit “less frivolous.”

***Wilborn v. Southwestern Bell Tel. Co.*, 2005 U.S. Dist. LEXIS 4699 (N.D. Tex. 2005) (mem. op.).**

Wilborn alleged she was sporadically disabled by various physical and psychological symptoms, which she eventually identified as stress responses to the particular set of inbound call duties that SWB allocated to customer service representatives. As the court put it, “Wilborn’s alleged disability consists of an idiosyncratic inability to cope with a particular job.” The pro-se plaintiff provided no evidence that an impairment disqualified her from any broad class of jobs, and her aversion to a particular job does not make her disabled under the ADA. Likewise, she produced no evidence indicating that SWB regarded her as disabled, and her retaliation claim failed because she did not produce sufficient evidence to rebut the legitimate reasons SWB gave for changing her job status. Wilborn also claimed she suffered harassment in a hostile work environment, but this failed because she was not disabled and the incidents of harassment she alleged did not rise to the level of being actionable conduct.

***Vore v. Colonial Manor Nursing Ctr.*, 2004 U.S. Dist. LEXIS 20888 (N.D. Tex. 2004) (mem. op.).**

Plaintiff, a nurse, began to experience serious medical complications secondary to diabetes, including: frequent dialysis treatments for end-stage renal disease, triple bypass heart surgery in January 1999, a kidney transplant, and a diabetic ulcer on his toe. At first, defendant accommodated plaintiff’s medical needs. But this changed. His supervisor told him he needed to give advanced notice of medical appointments (“Ideally a year”), and ordered him to schedule all his appointments for one day at once. At the same time, Vore was assigned to cover floor shifts with increasing frequency, which was difficult because his podiatrist had confined him to a wheelchair. His complaints about this assignment were to no avail. After his toe was amputated, he took 180 days leave under FMLA, and was then fired because he could not return to work.

While some of his claims were barred by limitations since his charge of discrimination (to the EEOC) was filed more than 300 days after the alleged incidents of discrimination, the court declined to grant summary judgment on the issue of whether the defendant tried to reasonably accommodate Vore’s physical limitations in regard to his ulcerated toe. After the plaintiff asked to be relieved of floor duty because of his toe, the defendant had a duty engage in a flexible, interactive process with its employee to fashion a reasonable accommodation. Here, the defendant did not point to any evidence suggesting that anyone ever met with plaintiff to discuss his request or explore alternative accommodations. Instead, the defendant argued that plaintiff failed to submit medical documentation supporting his request to be relieved from floor duty, even though the employee need only request an accommodation and identify the nature of his disability to trigger the ADA. A note from the doctor is not required. Thus, there were issues of material fact concerning whether the employer tried to accommodate its employee’s disability, so summary judgment was denied.

***Galvan v. City of Bryan*, 367 F. Supp. 2d 1081 (S.D. Tex. 2004), *aff’d* by 121 Fed. Appx. 567 (5th Cir. 2005) (per curiam).**

Galvan and a co-worker were informed that their positions as Crew Workers were being eliminated, and that they must obtain the necessary license to work as Equipment Operators, or they would face termination. Despite Plaintiff’s repeated and sincere efforts, he was unable to pass the tests required to obtain the license. Plaintiff argued that he is ineligible for the necessary commercial driver’s license, under state law, because he suffers from epilepsy and learning disabilities which make it impossible for him to obtain

a license. Galvan alleges that the City knew his disabilities precluded his eligibility for the license, and that it created that requirement as a pretext for his termination. He complains that it was his disabilities, and not the lack of a professional license, that led to his discharge.

The court first looked at whether Galvan was disabled. The plaintiff provided no evidence to show that the extent of his limitation due to epilepsy was substantial in terms of his own experience, and no admissible medical evidence on either the severity of his epilepsy, or its expected duration or long-term impact. His learning disability was also dismissed, because he produced no evidence to show that his learning disabilities substantially limited him.

The court then went on to note that even if the plaintiff were disabled, he would still have to show that he is qualified for the job he seeks, which would be impossible because a commercial drivers' license is required to work as an Equipment Operator.

***Shabazz v. Tex. Youth Comm'n*, 300 F. Supp. 2d 467 (N.D. Tex. 2003) (mem. op.).**

Pro se plaintiff here attempted to sue the Texas Youth Commission for ADA violations. Since it is unclear whether the plaintiff was protesting discrimination or retaliation, the court examined both claims. The U.S. Supreme Court has found in the context of a Title I ADA discrimination claim the states' sovereign immunity was preserved. In this case, the court extended this finding of immunity to Title V ADA retaliation claims as well, and dismissed those claims with prejudice. The plaintiff had also tried to sue individual employees of the Texas Youth Commission for violating the ADA. Analogizing to the prohibition of suits against individuals under Title VII of the Civil Rights Act, the court also dismissed these claims.

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***Miller v. Texas Tech University Health Sciences Center*, 2005 WL 1950352 (5th Cir. 2005, no cert.) (en banc).**

A university student with a partially paralyzed foot and a blind former employee brought separate actions against TTUHSC for violation of the Rehabilitation Act. An en banc panel affirmed and remanded for further proceedings not stated in the opinion, holding that:

- State agencies waived their Eleventh Amendment immunity from suit in federal court by accepting federal funds that had been granted by Congress under authority of the Constitution's spending clause and expressly conditioned on waiver of immunity from suit under the Rehabilitation Act, even though the agencies lacked express statutory authority to waive such immunity;
- If a state agency accepts such conditional federal financial assistance, it waives its Eleventh Amendment immunity even though the federal funds are not earmarked for programs that further the anti-discrimination and rehabilitation goals of the Rehabilitation Act;
- The presence of a "clear statement" is sufficient to satisfy the need for a state's waiver of immunity from suit to be "knowing."
- 42 U.S.C.A. §2000d-7 clearly states that acceptance of federal funds waives immunity from suit in federal court. The Court rejected defendant's argument that as state agencies, their authority to *accept* federal funds is insufficient to waive Eleventh Amendment immunity, which, it argued, cannot be validly waived without *express* statutory authority. Under ordinary contract principles, the Defendants were bound by the clearly stated condition under §2000d-7 that acceptance waives immunity from suit in federal court. The conditions are inseparable from the offer of the funds: "The

States may reject the condition of waiver of Eleventh Amendment immunity by rejecting the funds, or they may accept the funds and the conditions; they cannot, however, accept the benefits of the funds and reject the inextricably intertwined condition of waiver by claiming *post hoc* that the delegation of authority to accept the funds did not carry with it the authority to waive immunity.” *Id.* at *2.

The court held that the University waived its argument that §504 and §2000d-7 are unconstitutional Spending Clause legislation because they place conditions on federal grants that are not *reasonably related* to the purpose of the expenditure. Therefore, there is no holding on the relatedness prong. However, the Court stated that if it were to address the relatedness prong, it would agree with those circuits which have concluded that, if the involved state agency or department accepts federal financial assistance, it waives its Eleventh Amendment immunity even though the federal funds are not earmarked for programs that further the anti-discrimination and rehabilitation goals of ' 504.

Following the reasoning of *Pace II*(*see below*), and in accordance with *Pennhurst States School & Hospital v. Halderman*, 451 U.S. 1 (1981) "the only 'knowledge' that the Court is concerned about is a state's knowledge that a Spending Clause condition requires waiver of immunity, *not* a state's knowledge that it has immunity that it could assert." 403 F.3d at 279. Moreover, if Congress satisfies the clear statement rule, the knowledge prong of the Spending Clause waiver analysis is fulfilled. The Spending Clause statutes at issue are clear and unambiguous regarding waiver.

***Pace v. Bogalusa City School Bd.*, 403 F.3d 272 (5th Cir. 2005, cert. filed)(*en banc*).**

In this *en banc* decision, the Fifth Circuit held that Louisiana voluntarily and knowingly waived its Eleventh Amendment immunity by accepting federal Rehabilitation Act funds made subject to 42 U.S.C.A. §2000d-7. (The waiver argument does not apply to Title II because the Americans with Disabilities Act (ADA) does not condition the receipt of federal funds on compliance with the Act or waiver of Eleventh Amendment immunity. Title II applies to public entities regardless of whether they receive federal funds).

To determine whether issue preclusion applied, the court compared the standards of accessibility under the IDEA with those of the ADA and ' 504 to determine whether the legal standards are “significantly different.” When a child complains that his disability renders a portion of the campus inaccessible, the application of the 1997 amendments to the IDEA is triggered. In determining whether the school has met its obligations under the amendment and provided the disabled student with a “free appropriate public education,” the hearing examiner, the State Level Review Panel, and the district court must determine whether the area of the school in question complies with either the Americans with Disabilities Accessibility Standards or the Uniform, Federal Accessibility Standards. These are the same federal guidelines the school must comply with to satisfy the accessibility requirements of the ADA and §504. *Pace* did not demonstrate that the defendants owed him any greater or different obligation under §504/ADA than he was entitled to under the IDEA. Thus, the accessibility issue *Pace* litigated in his IDEA case and lost was the same issue he sought to litigate in his ADA/§504 claim.

RECENT TEXAS CASES ON DISABILITY DISCRIMINATION

***Haggar Apparel Co. v. Leal*, 154 S.W.3d 98 (Tex. 2004) (per curiam).**

Haggar Apparel Co. employed Maria Leal as a seamstress and label presser from 1979 to 1994. In 1983, Leal was diagnosed with carpal tunnel syndrome in her left wrist and successfully treated, but in 1993, she suffered a recurrence of that condition and also developed a similar condition in her right wrist as well as lower back problems. She was treated for several months, during which she continued to work, although at lighter duties. One of her physicians released her to return to her regular job in June 1994, but she worked only a few days before taking a week's vacation. She returned to work more than two days late and was terminated. At the time, Leal was on probation for excessive, unexcused absences.

Leal sued for age discrimination, disability discrimination, retaliation for filing a workers' compensation claim, and intentional infliction of emotional distress. The jury returned a verdict in her favor on disability discrimination.

Leal conceded at trial that shortly before she was terminated, one of her physicians released her to moderate duty. Leal argues that the evidence showed she was unable to work at assembly line jobs like the one at Haggar, but it shows exactly the opposite: Leal continued to work at Haggar up to the day she was terminated. Even if Leal were correct, the court held, she did not argue that she was unable to work in a broad class of jobs. To the contrary, she testified that after she left Haggar she worked for a child care facility and applied to work at the public school. The court held that Leal did not adduce any evidence to support her claim that her impairment substantially limited her ability to work, and reversed the judgment.

***Little v. Tex. Dep't of Crim. Justice*, 148 S.W.3d 374 (Tex. 2004).**

The issue decided was whether there was summary judgment evidence that Evelyn Little, who wears a prosthesis on her left leg and walks with a noticeable limp, had a physical impairment that substantially limited at least one major life activity. The trial court granted the defendants' motion for summary judgment. The court of appeals affirmed, concluding that Little had failed to make a threshold showing that she has a disability. The Texas Supreme Court reversed the lower courts.

The court ruled that a person need not be totally unable to walk to be disabled under the ADA; she need only be significantly restricted as to the condition, manner, or duration of her walking as compared to that of the average person in the general population. Viewing the evidence in a light most favorable to Little, it seems that she was significantly restricted as to the manner in which she could walk, and since walking is a major life activity, the summary judgment on this issue was granted in error and the case was remanded.

***Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735 (Tex. 2003) (per curiam).**

In 1993, Canchola underwent sextuple bypass surgery that caused him to miss thirteen weeks of work. When he returned, he could do no heavy lifting and was limited to working only four hours per day. Over time, Canchola began increasing his work hours, but in April of 1994 a bypassed artery became occluded and he missed another month of work. He again returned to work at a reduced schedule of four hours per day. On August 20, 1994, Canchola was fired after three female employees accused him of sexual harassment.

Canchola sued Wal-Mart for disability discrimination, age discrimination, and intentional infliction

of emotional distress. After the close of Canchola's evidence, the trial court dismissed the age-discrimination claim, and the jury found for Canchola on his two remaining claims. Wal-Mart lost its first appeal, but successfully argued to the Texas Supreme Court that a judgment against it was improper because there was no evidence that its stated reason for the termination was a pretext or that Canchola's disability was a motivating factor in his termination.

Canchola had directed some persuasive criticisms towards Wal-Mart's investigation of his alleged sexual harassment, but that does not, by itself, prove that Canchola's heart condition was a motivating factor in his termination. Because he failed to meet his burden, the jury's verdict was overturned. The finding on intentional infliction of emotional distress was reversed as well, because Wal-Mart's actions were, as a matter of law, not extreme and outrageous. It had no duty to conduct an accurate investigation before deciding to fire an at-will employee.

***Thomann v. Lakes Reg'l MHMR Ctr.*, 162 S.W.3d 788 (Tex. App.--Dallas 2005, no pet.)**

Lakes Regional hired Thomann as a house parent and assigned her to the day shift at its Ninth Street home in 1998. In September 2000, Thomann underwent back surgery for degenerative disc disease. Three months later, Thomann was ready to return to work but told her supervisor that she was no longer physically able to work the day shift at the Ninth Street home because of her limited ability to lift, bend and turn. She traded positions with a coworker and returned to work in December 2000 on the night shift at the Park Street home. Kim Doyal, residential director of Lakes Regional, told Thomann that Lakes Regional did not have any "light duty" positions. But Thomann continued to work the night shift at the Park Street home where the patients were ambulatory and her lifting requirements were minimal.

In October 2001, Doyal asked Thomann for a full-duty work release from her doctor. This led to another medical evaluation, which affirmed restricting Thomann to lifting and carrying no more than twenty pounds at a time. In December 2001, Thomann made an internal complaint to the Lakes Regional human resources department against Doyal alleging that Doyal was discriminating against her based on her disability because, in November, Doyal had asked Thomann to cover a position at the more rigorous Ninth Street home.

On February 14, 2002, Thomann met with several officers of Lakes Regional who informed her that she could not continue to work in the house parent position because of her lifting restrictions but offered her an opportunity to apply for a position as a receptionist. This offer was confirmed in writing, and Thomann was given a week to reply, but she rejected the offer and Lakes Regional terminated her employment.

Thomann sued for disability discrimination and retaliation. The appellate court affirmed a no evidence summary judgment against the plaintiff, first noting that Thomann had not produced sufficient evidence to support an allegation that she was disabled. She offered no evidence that her lifting restriction substantially limited her from engaging in any of the activities of daily living, and no evidence that she is disqualified from a broad range of jobs because of her lifting restriction. Furthermore, she offered no other medical or employment records that supported her claim that she had a record of disability, and no evidence showing that her employer had regarded Thomann as having an impairment that substantially limits a major life activity.

The retaliation claim failed because the defendant had a legitimate, non-discriminatory reason for firing the plaintiff: she could not lift 44 pounds, as her job description required. Employers are not required to modify the duties of other employees or eliminate or reallocate essential functions of a position in order to provide accommodation. Furthermore, the defendant had in fact gone beyond what the law requires by offering the plaintiff a position that would accommodate her condition, which she refused.

RECENT TEXAS CASES ON AGE DISCRIMINATION

***City of Houston v. Fletcher*, 166 S.W.3d 479 (Tex. App.--Eastland 2005, no pet.).**

Fletcher sued the City of Houston for *age* discrimination. The jury found in her favor, and the city appealed, claiming that the evidence was insufficient. But the record indicated that Fletcher's supervisor had called her "incompetent," "a stupid old woman," and "senile." The supervisor had verbally abused the plaintiff-appellee, screaming and yelling at her, and had denied her necessary training because the supervisor thought that training would not do any good. Finally, her supervisor would not let Fletcher to receive phone calls at work even though she had a daughter at home who was ill. While some witnesses did not confirm these observations, others did, and the jury, as the sole judge of the credibility of the witnesses, could believe who it wanted. Thus, its finding of a *hostile work environment* was legally and factually justified.

***El Paso Healthcare Sys., Ltd. v. Carmona*, 160 S.W.3d 267 (Tex. App.--El Paso 2005, pet. filed).**

Appellee-plaintiff had been employed as a nurse in El Paso since 1979 and employed by the appellant-defendant since 1988. In May of 1997, she applied for and received a new position: Admitting Nurse. Carmona was 60 years old at the time of her transfer to the Admitting Department.

To meet its budget, the hospital had to reduce its payroll in 2000. The appellee's supervisor was provided with a list of employees from the Human Resources Department. The list identified the employees within the department by name, job title, and hire date, and did not contain any information reflecting the employee's age. The supervisor felt that the Appellee's position was redundant, and recommended to his supervisor that the Appellee's position should be eliminated. The supervisor's supervisor did not know Appellee's age.

During November and December of 1999, Appellant created another position in a different department known as Resource Management Specialist in the Case Management Department. Appellee contends that the creation of this position was a pretext for the elimination of her position and her replacement by a younger employee, and that the jobs were substantially the similar. The plaintiff also argued that the defendant did not formally adhere to its internal reduction in force policies. The plaintiff also presented some statistical evidence describing demographic information about the employees who were affected by the reduction during the time period of May 1999 to May 2001.

Appellee sued, contending that her age was a motivating factor and consideration in the elimination of her position in violation of the TCHRA (now known as "Chapter 21 of the Texas labor Code"). The jury agreed and awarded the plaintiff more than \$200,000 in economic damages and \$1.3 million in exemplary damages. The defendant appealed, challenging, among other things, the legal and factual sufficiency of the evidence against it.

The first question the court looked at was whether age was a motivating factor in the defendant's decision to fire the plaintiff. The evidence established that a younger woman was hired to perform tasks for the hospital which were similar to the job held by the plaintiff, which is legally sufficient ground for finding that age was a motivating factor.

But the court found that the evidence supporting this conclusion was not factually sufficient--the jury's verdict was "so contrary to the great weight and preponderance of the evidence that it is clearly wrong and manifestly unjust." The court did not agree that the fact that Appellant created a similar position several months before the elimination of the plaintiff's position was evidence of an intent to replace the plaintiff

with a younger employee. The court stated, “Appellee's attorney made the speculative leap in logic to argue that the fact of a similar position in a different department of the hospital, created by different supervisors, reporting to a different chain of command, created in response to a specific management problem that existed for several months before the elimination of Appellee's position, is evidence of a scheme of age discrimination.” As for the defendant’s failure to follow its own policy during the reduction in force, the court wrote, “We do not hold that the mere technical non-compliance with an internal policy is sufficient evidence of discriminatory behavior without more.” The statistical evidence that the plaintiff produced was not adequately supported, because no witness testified about the significance of these statistics nor how the statistics are evidence of a discriminatory intent.

Finally, the plaintiff argued that the possible falsity of the reasons for her termination that the defendant puts forth can, together with the elements of the prima facie case, constitute sufficient proof of discrimination. For this to be sufficient, court held, plaintiff’s *prima facie* case has to be strong. The court notes that “even if the reasons Appellant cited for terminating Appellee were false, she still bore the ultimate burden to prove that Appellant discriminated against her because of her age.” The relevant inquiry is not whether the business decisions made by Appellant were appropriate or well-founded.

***Stewart v. Sanmina Tex., L.P.*, 156 S.W.3d 198 (Tex. App.--Dallas 2005, no pet.).**

On March 2, 2001, Stewart was laid off as a sales representative because of an alleged reduction in force. Stewart’s supervisor told him that his dismissal was based on job performance. Stewart was over forty years old, and had been working for the company for a little over three years. Stewart sued, alleging discrimination, breach of contract for commissions he hadn’t been paid and expenses he hadn’t been reimbursed for, and retaliation, since his former employer was suing him for violating its proprietary information agreement. The trial court granted summary judgment for the defendant and the plaintiff appealed.

The appellate court affirmed the dismissal of the retaliation claim because a former employer’s counterclaim cannot form the basis for a retaliation claim as a matter of law.

The court’s ruling on the age discrimination claims was more favorable to Stewart, however. Plaintiff established a prima facie case by showing that he was over 40, had been laid off and replaced by a twenty-seven-year-old account manager, and was qualified for the job because he had over fifteen years’ experience as a manufacturer’s representative, his 1999 job review noted his performance as “exceeds requirements,” his 2000 job review was “meets expectations,” and his sales totals increased each year. The defendants were able to show legitimate, non-discriminatory reasons for terminating Stewart’s job, shifting the burden back to the plaintiff. Stewart presented evidence such as awards, commendations, performance evaluations, and sales experience to show that he was clearly better qualified than his replacement. Furthermore, many of the reasons the defendant presented for firing the plaintiff were brought up for the first time in litigation. Thus, there was an issue of fact as to whether appellee’s reason for discharge was pretext for discrimination, and summary judgment on that issue was inappropriate.

***Kokes v. Angelina College*, 148 S.W.3d 384 (Tex. App.--Beaumont 2004, no pet.).**

Dr. Ronald Kokes, a sixty-five-year-old white male, complained Angelina College discriminated against him on the basis of age, race, and sex by selecting a thirty-five-year-old black female as psychology instructor despite his claimed superior qualifications. The trial court granted summary judgment in favor of

the defendant, but the Court of Appeals reversed. The plaintiff has produced evidence such as superior qualifications, the failure of the Dean of Instruction and Admissions to interview him, and the screening committee scores and listing of finalists that suggested he was the top candidate. Furthermore, a witness had indicated in a deposition that evidence race and age were motivating factors in Angelina's decision-making. This case also presented the not-seen-everyday issue of defendant claiming, unsuccessfully, that its own employee was not qualified to testify because, approximately one month after his deposition, he was the subject of mental competency hearing.

***Rice v. Russell-Stanley, L.P.*, 131 S.W.3d 510 (Tex. App.--Waco 2004, pet. denied).**

Adolph Rice was removed from his position as traffic coordinator for Russell-Stanley L.P. and replaced by a younger employee. Rice alleges the removal was because of his age and filed suit in state court approximately six months after his removal. Russell-Stanley filed a no-evidence motion for summary judgment asserting that because Rice had no evidence he had received a TCHR right-to-sue letter, he had failed to exhaust his administrative remedies. The trial court granted the motion for summary judgment.

The appellate court reversed because the right-to-sue letter is not part of the TCHRA's exhaustion requirement; this letter is only notice of exhaustion. Russell-Stanley asserted only one basis for its summary judgment motion: that Rice had no evidence of a right-to-sue letter. Russell-Stanley did not contest whether Rice had actually received a notice of dismissal or failure to resolve from the TCHR. The TCHR is required to send such notice. If Rice received a notice of dismissal or failure to resolve, then he was entitled to request, in writing, a right-to-sue letter. Rice was not required to request it. Thus, because the right-to-sue letter is not part of the exhaustion of administrative remedies requirement, Rice was not required to present evidence that he received a right-to-sue letter from the TCHR.

***Tex. Parks & Wildlife Dep't v. Dearing*, 150 S.W.3d 452 (Tex. App.--Austin 2004, pet. denied), cert. denied, 125 S. Ct. 1723 (2005).**

After a complicated process spanning several legislative sessions, the salaries of all peace officers were raised in 1999. But certain classes of game wardens had been given salary increases before 1999, and to avoid giving these individuals the benefit of their previous specific pay raises *and* the general pay raise of 1999, this class of game wardens was reclassified. Thus, in 1999 their annual salary went from \$ 42,084 to \$ 44,600 instead of the \$ 51,600 they would have received if they had not been reclassified. Game Warden Dearing sued, alleging that the reclassification constituted age discrimination because it had a *disparate impact* on employees over the age of forty, and because none of the other sergeant positions at the Department were reclassified. He sought to certify a class consisting of all the game wardens who had been thus effected. The trial court certified the class, and the TPWD filed an interlocutory appeal of this order.

Age discrimination claims alleging disparate impact are treated differently from other disparate impact claims. Since the Texas law on age discrimination, Tex. Lab. Code Ann. § 21.05, orders Texas courts to follow the judicial interpretation of the ADEA, the court followed *Smith v. City of Jackson, Miss.*, 351 F.3d 183 (5th Cir. 2003), *aff'd* 125 S. Ct. 1536 (2005) (discussed above), and held that there is no disparate-impact theory of liability under the Texas Act. Therefore, class certification on this issue was improper.

The subsequent appellate history of this case is interesting. The court's logic in this opinion relied on the Fifth Circuit's categorical rejection of disparate-impact age discrimination claims, which the Supreme

Court had overruled. Yet the Supreme Court denied certiorari in this case after *Smith* had been released.

***Cantu v. Tex. Workforce Comm'n*, 145 S.W.3d 236 (Tex. App.--Austin 2004, no pet.).**

In 1995, the 74th Texas Legislature privatized certain Workforce Commission programs. Plaintiff-appellants were all employees of the Workforce Commission who worked in a program that was set for elimination, and their employment was terminated in 1998. They sued, claiming that the reduction in force was a pretext for the underlying motive of eliminating higher-paid older workers. But their prima facie case failed because they could not demonstrate that similarly situated non-protected class members were treated more favorably. All of the employees of the targeted programs, young or old, were terminated in conjunction with the Workforce Commission's implementation of the privatization plan.

The plaintiff's disparate impact claims failed as well because the Third Court ruled that a disparate impact theory of liability is not cognizable under the ADEA. *See Dearing*, 150 S.W.3d 452, *supra*. Therefore, summary judgment against the plaintiffs was affirmed. This is another *disparate impact* case decided *Smith*, 125 S. Ct. 1536.

***Texas A&M-Corpus Christi v. Van Zante*, 2005 Tex.App. LEXIS 1974 (Tex. -App.--Corpus Christi 2005).**

This case highlights the timeliness issues involved in perfecting a Chapter 21/ Title VII claim at a university or other employer where there are multiple levels of administration/bureaucracy. Professor Van Zante taught at A&M's Kingsville campus, and applied for a position at Corpus Christi, which he did not receive and which he believed was due to discrimination. The controversy surrounded whether his charge of discrimination was timely filed with the Corpus Christi Human Relations Commission and involved when his 180 days began to run. On April 11, 2001, the plaintiff--after hearing from a colleague that the position had been filled--e-mailed the Dean as the court describes:

- On April 11, 2001, Vanzante emailed Dean Abdelsamad, complaining that his application had "not received due consideration." Vanzante complained, "[I]t is difficult to understand how someone with my experience and credentials was not invited for an interview (especially given where I live) when compared to the experience and credentials of those ultimately hired." On April 16, 2001, Dean Abdelsamad emailed in response, "Thanks for keeping me informed. As you may know, we filled all positions this year. It is [sic] excellent outcome considering the tight market for faculty in business." [2005 WL 608273, *1]

If that was the date that began the plaintiff's time to file a charge, he was too late. On the other hand, the plaintiff argued that his time commenced on June 11, 2001, when he received a letter from the chair of the department informing plaintiff that "he was not selected for any of the advertised positions and thanked him for applying to the College of Business." If plaintiff's time commenced in June, then his charge was timely. *Id.* The Court of Appeals, quoted the U.S. Supreme Court in *Del. State College v. Ricks*, 101 S.Ct. 498 (1980) and held that the plaintiff's time began in June, as that was the more formal/official notification that he would not be hired in any capacity, for any position:

- "The Supreme Court cautioned that "the limitations periods should not commence to run so soon that

it becomes difficult for a layman to invoke the protection of the civil rights statutes." Id. at 262 n. 16, 101 S.Ct. 498. Given this admonishment and the Supreme Court's emphasis that notice of the employment decision should be predicated on a formal and official decision, we conclude that the Ricks opinion does not favor the University." [2005 WL 608273, *3]

***Salay v. Baylor University*, 115 S.W.3d 625 (Tex. App.–Waco 2003, pet. denied)**

Non-tenured professor, whose contract was not renewed, claimed that he was retaliated against for supporting another individual, who had “employment problems” with the university. Professor lost after ten-day jury trial and appealed, claiming that charge was defective because it did not include all elements of retaliation in TCHRA, §21.055, and did not permit him to argue that the university perceived he had engaged in protected activity. Plaintiff asked the Court to adopt the “perception theory” of illegal retaliation. *See Fogleman v. Mercy Hospital, Inc.*, 283 F.3d 561 (3rd Cir. 2002).

- Court found no error and upheld take-nothing judgment in favor of University
- Court determined that legislative intent of TCHRA, from plain and common meaning of words used, rather than a more subjective “intent” determination used in *Fogleman*, required it to deny recovery if University (mis)perceived that plaintiff actively participated in female’s discrimination claim.
- Since there was no evidence that plaintiff actively participated (no evidence that plaintiff had actually testified, assisted or participated in a proceeding), application of a perception theory would encroach on the at-will employment doctrine.